

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

ORIGINAL

74-2087

IN THE
United States Court of Appeals
For the Second Circuit

WILLIAM J. HEAD,

Appellant,

vs.

BROTHERHOOD OF RAILWAY, AIRLINE AND
STEAMSHIP CLERKS, FREIGHT HANDLERS,
EXPRESS AND STATION EMPLOYEES (BRAC)

R. J. DEVLIN, Vice-President Express Division BRAC

C. L. DENNIS, Internal President BRAC

G. E. STEPHENSON, Secretary-Treasurer Express
Division BRAC,

Appellees.

Appeal from the United States District Court
For the Western District of New York State

BRIEF OF APPELLEES

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APPLICABLE STATUTES

Section 501 (a) (b) (c) of the Labor-Management Reporting and Disclosure Act of 1959, As Amended, Title V—Safeguards for Labor Organizations, Fiduciary Responsibility of Officers of Labor Organizations provides that:

Section 501 (a) The officers, agents, shop stewards, and other representatives of a labor organization occupy positions of trust in relation to such organization and its members as a group. It is, therefore, the duty of each such person, taking into account the special problems and functions of a labor organization, to hold its money and property solely for the benefit of the organization and its members and to manage, invest, and expend the same in accordance with its constitution and bylaws and any resolutions of the governing bodies adopted thereunder, to refrain from dealing with such organization as an adverse party or in behalf of an adverse party in any matter connected with his duties and from holding or acquiring any pecuniary or personal interest which conflicts with the interests of such organization, and to account to the organization for any profit received by him in whatever capacity in connection with transactions conducted by him or under his direction on behalf of the organization. A general exculpatory provision in the constitution and bylaws of such a labor organization or a general exculpatory resolution of a governing body purporting to relieve any such person of liability for breach of the duties declared by this section shall be void as against public policy.

(b) When any officer, agent, shop steward, or representative of any labor organization is alleged to have violated the duties declared in subsection (a) and the labor organ-

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ization or its governing board or officers refuse or fail to sue or recover damages or secure an accounting or other appropriate relief within a reasonable time after being requested to do so by any member of the labor organization, such member may sue such officer, agent, shop steward, or representative in any district court of the United States or in any State court of competent jurisdiction to recover damages or secure an accounting or other appropriate relief for the benefit of the labor organization. No such proceeding shall be brought except upon leave of the court obtained upon verified application and for good cause shown which application may be made ex parte. The trial judge may allot a reasonable part of the recovery in any action under this subsection to pay the fees of counsel prosecuting the suit at the instance of the member of the labor organization and to compensate such member for any expenses necessarily paid or incurred by him in connection with the litigation.

(c) Any person who embezzles, steals, or unlawfully and willfully abstracts or converts to his own use, or the use of another, any of the moneys, funds, securities, property, or other assets of a labor organization of which he is an officer, or by which he is employed, directly or indirectly, shall be fined not more than \$10,000 or imprisoned for not more than five years, or both.

APPLICABLE RESOLUTION NO. 201 (As Amended)

STRUCTURE COMMITTEE

WHEREAS, A Committee on Structure be authorized by the 1971 Convention and be charged with the responsibility of recommending specific changes in structure to the 1975 Convention, and

WHEREAS, Such task cannot be effectively undertaken unless the Committee on Structure is specifically authorized as to the scope of its functions, operations and financial resources, and

WHEREAS, In order for the Committee on Structure to effectively carry out its duties, it is imperative that experimentation be allowed to test the desirability of proposed improvements in the Brotherhood structure.

THEREFORE, BE IT RESOLVED, That the 1971 Convention authorize the Committee on Structure as follows:

1. *Functions.* The Committee shall be invested with the specific responsibility to investigate the forms and types of union structure in existence today; to solicit and receive suggestions for improvement of our present structure from our membership and officers on a local, system, and national level, and to report to the next regular BRAC Convention with specific recommendations, based on its studies, for improvements of the basic structure of the BRAC.

2. *Operations.* The Committee shall hold meetings, hearings, special investigations and any other related activities as may be deemed appropriate by the Chairman or by a majority of the members of the Committee.

3. *Finances.* The Grand Lodge will absorb the travel, per diem, and other appropriate expenses as may be in-

curred by the Committee in the pursuit of its assigned duties and responsibilities.

THEREFORE, BE IT FURTHER RESOLVED, That such Committee on Structure be authorized by Convention Action to recommend to the Executive Council, on a temporary experimental basis, structural changes in subordinate units of the BRAC, which can only be effected if the involved units accept these changes. Subordinate units shall also have the right to propose structural changes which, if approved by the Committee and the Executive Council, may be implemented on an experimental basis; and

THEREFORE, BE IT FURTHER RESOLVED, That any successful experiment cannot be automatically accepted as a permanent change in the structure unless it is within the framework of the Constitution and approved by the next regular Convention; and

THEREFORE, BE IT RESOLVED, That the delegates here assembled instruct the International President to appoint a Structure Committee, consisting of a Chairman and not more than a total of twenty (20) members, chosen from various units and divisions of the Brotherhood, specifically Railroad, Canada, T.C., Express, Airlines and Allied Services, such Committee to be appointed with proportionate representation from the various divisions to undertake a complete study of the structure of our Brotherhood and to complete such a study prior to our next Quadrennial Convention and submit its recommendations to the International President and Executive Council, not less than ninety (90) days prior to the convening of the next Quadrennial Convention, and that said report and recommendations be submitted to the Committee on Constitution and Laws.

TABLE OF AUTHORITIES

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Cases:	
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Docket No. 74-2087

WILLIAM J. HEAD,

Appellant,

vs.

BROTHERHOOD OF RAILWAY, AIRLINE AND
STEAMSHIP CLERKS, FREIGHT HANDLERS,
EXPRESS AND STATION EMPLOYEES (BRAC)

R. J. DEVLIN, Vice-President Express Division BRAC

C. L. DENNIS, Internal President BRAC

G. E. STEPHENSON, Secretary-Treasurer Express Division
BRAC,

Appellees.

**Appeal from the United States District Court
For the Western District of New York State**

BRIEF OF APPELLEES

Preliminary Statement

Appellant is appealing from an order of District Judge John T. Curtin, entered in the United States District Court, Western District of New York on July 25, 1974 which granted appellees' motion to dismiss the complaint in this action.

Appellant did not obtain leave of the Court below before commencing this action as he was requested under 29 U.S.C. 501(b).

In an attempt to satisfy the requirement of 29 U.S.C. 501(b) that a union member request of his union that an action be instituted and have that request denied as a condition to the member himself bringing an action the appellant sent a letter to International President of BRAC, Mr. C. L. Dennis (see page S3 of Appellant's appendix). In that letter the appellant requested that an action be commenced against the International President himself and the Executive Council of BRAC for violations of 29 U.S.C. 501(a) and (b).

However, when this request was denied the appellant commenced this action against the union itself, R. J. Devlin, Vice President, Express Division, of BRAC, C. L. Dennis, International President of BRAC, and G. E. Stephenson, Secretary-Treasurer, Express Division of BRAC.

It is well settled that a union organization as such cannot be a defendant in an action under Section 501. Only individuals can be named defendants under actions based on Section 501.

There was no request from the appellant that any action be commenced against either R. J. Devlin or G. E. Stephenson.

It should be noted, therefore, that the only person who could possibly have been a proper defendant was C. L. Dennis, and that is, of course, assuming that a cause of action could be found against him under Section 501.

These facts regarding appellant's complete failure to comply with the specific requirements of Section 501 rela-

tive to commencing an action were all brought to the attention of the Court below. However, the Court found no need to even refer to these facts and confined its decision to dismiss the complaint on other more serious and substantial grounds, to wit, that "the facts alleged by plaintiff do not (give) rise to a legally cognizable claim under 29 U.S.C. Section 501 and its Judicial interpretation in this Circuit."

Statement of Facts

The Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employees (BRAC) is an international union whose membership is in the main made up of employees of the railroad industry. However, a division of BRAC known as the Express Division was established long years ago to specifically concern itself with the members of BRAC who were employed by the Railway Express Agency. The operations of the Railway Express Agency are now carried on by REA Express, a corporation which maintains its principal office in New York City, but which has a nationwide express delivery operation.

The Express Division of BRAC was originally structured to service between 40,000 and 50,000 members. Unfortunately, for a variety of reasons, the number of employees of REA Express who are members of the Express Division of BRAC diminished drastically during the years to a point where in 1974 the active membership of the Express Division of BRAC was at a low point of between 12,000 and 13,000. Including non-active members, the number in 1974 was approximately 23,000.

The approximately 13,000 Union members employed by REA Express were divided into 120 local lodges, and of these 19 lodges had below 50 members, 54 lodges had below 100 members, and 70 lodges had below 150 members.

Because of the drastic decline in membership of the Express Division of BRAC many of the 120 local lodges were having great difficulty in attempting to function properly in order to fully protect and represent the interests of their individual members. Under the structure of the Express Division of BRAC prior to the restructuring in 1974 many local lodges were having great difficulty in carrying out their functions.

In the 1971 Quadrennial Convention of BRAC, a resolution, known as Resolution No. 201, was duly adopted by the Convention. This resolution is fully set forth on pages R-77 and R-78 of the Appellees' Appendix. Resolution No. 201 authorized and provided for the restructuring of subordinate units of BRAC and contained certain limitations for the protection of the subordinate units. The resolution established a Committee on Structure which was authorized to receive proposals of organizational structural changes from subordinate units of BRAC.

Under the terms of Resolution No. 201, if a proposal was approved by the Committee on Structure and then approved by the Executive Council of BRAC, then the structural changes could be implemented on a temporary experimental basis; however, such changes in structure would not be deemed permanent changes unless approved by the next regular Quadrennial Convention of BRAC to be held in May 1975. One of the subordinate units of BRAC

which was given the right to propose structural changes to the Committee on Structure is the National Association of Express General Chairmen which operates under Article 5 of the Protective Laws of BRAC. (This National Association of Express General Chairmen is referred to in paragraphs 7, 9 and 10 of Appellant's Affidavit which appears on page 11 of the Appellant's Appendix and also on page R-4 of Appellees' Appendix.)

After considerable study and analysis of the then existing structure of the Express Division of BRAC by this subordinate unit, to wit, the National Association of Express General Chairmen, adopted a restructuring proposal for the Express Division at a meeting held on May 28 and May 29, 1974. (The adoption of such proposal is referred to in paragraphs 9 and 10 of the Appellant's Affidavit set forth on page 11 of the Appellant's Appendix. The minutes of the meeting held on May 29, 1974 are printed on pages R-43 through R-47 of Appellees' Appendix.)

In accordance with the terms of Resolution No. 201, the proposal for restructuring of the Express Division was then submitted to the Committee on Structure established by Resolution No. 201 for its consideration.

The Committee on Structure did at a meeting held on July 5, 1974 approve the proposed plan of restructure of the Express Division by a vote of 13 to 3. (The minutes of the meeting of the Committee on Structure are found on pages R-49 through R-51 of the Appellees' Appendix.)

Following this approval by the Committee on Structure, the plan was submitted to the Executive Council of BRAC in accordance with the requirements of Resolution No. 201,

and it was duly approved by the Executive Council as evidenced by the letter of the International Secretary-Treasurer dated June 10, 1974. (A copy of which is found at page R-53 of Appellees' Appendix.)

Following the approval by the Executive Council of the proposed plan of restructuring for the Express Division of BRAC, all local lodge officers in the Express Division were advised by the International President, C. L. Dennis, by letter dated June 13, 1974, a copy of which appears on pages R-55 and R-56 of Appellees' Appendix, that the proposal for reorganization of the Express Division which was proposed by the National Association of Express General Chairmen, approved by the Committee on Structure and thereafter approved by the Executive Council of BRAC, was processed through the organization in accordance with the terms and authority of Resolution No. 201 and was thereupon put into effect as of July 1, 1974.

It is of importance that the Court be aware of the fact that the experimental restructuring of the Express Division is subject to approval by the next regular Quadrennial Convention of BRAC to be held in May 1975, in accordance with Resolution No. 201.

Under the new and presently operating structure of the Express Division, the funds of prior individual local lodges have been combined for the operation of the Express Division and are separated from other funds of the International Union. If the new structure for some reason is denied approval by the BRAC Convention in 1975, the old structure of local lodges can once again be put into operation and the individual lodges would share in the then exist-

ing funds of the Express Division in proportion to the initial contribution to the consolidated fund.

The arrangements made for the supervision and care-taking of all funds of the local lodges which were consolidated under the adopted restructuring plan are fully explained in an affidavit of G. E. Stephenson, Secretary-Treasurer of the Express Division of BRAC, executed and sworn to on July 9, 1974. This affidavit was submitted to the Court below in support of the motion to dismiss. (See pages R-79 through R-81 of Appellees' Appendix.)

POINT I

The District Court properly granted appellees' motion to dismiss the complaint.

The United States Court of Appeals for the Second Circuit has adopted a "restrictive view" of 29 U.S.C. Section 501, as stated by Judge John T. Curtin in the Order dated July 25, 1974 which is being appealed.

An examination of the restructuring plan (pages R-11 through R-38 of Appellees' Appendix) which has been in operation since July 1, 1974, will result in one understanding the very real problems of the Express Division of BRAC caused by the drastic drop in membership and the need for restructure to enable the Express Division of BRAC to render appropriate services to its members, which is the obligation of the Union.

The restructuring the the Express Division was done in careful and full compliance with the mandate and author-

ity to restructure sections or units of BRAC as set forth in Resolution No. 201 of the 1971 BRAC Convention. The Resolution No. 201 had as one of its aims that duly approved plans be allowed to be put into operation so that the 1975 BRAC Convention would have the benefit of the experience of the operation of a plan before being asked to approve or disapprove such plan. This desire was expressed in the words,

“Whereas, in order for the Committee on Structure to effectively carry out its duties, it is imperative that experimentation be allowed to test the desirability of proposed improvements in the Brotherhood structure.”
(See page R-77 of Appellees’ Appendix.)

There is no allegation in the complaint of any action which would have given the District Court jurisdiction under 29 U.S.C. Section 501. The appellant apparently considered his personal suspicions of possible future wrongdoing by others as being sufficient to grant the Court below a basis to engage BRAC and the other appellees in litigation.

Fortunately, the District Court, relying on the interpretation of what is a legal cognizable claim under 29 U.S.C. Section 501 in the Second Circuit, found little difficulty in dismissing the complaint of appellant.

This Court has said in *Gurtun v. Arons*, 339 F.2d 371 (2d Cir. 1964), referring to 29 U.S.C. Section 501:

“It is equally clear that Section 501 of the L.M.R. D.A. has no application to the present controversy. A simple reading of that section shows that it applies to fiduciary responsibility with respect to the money

and property of the union and that it is not a catch-all provision under which union officials can be sued on any ground of misconduct with which the plaintiffs choose to charge them. If further corroboration for this position be needed it will be found in the legislative history and in the law review articles cited by Judge Tenney in his opinion in the district court. 234 F.Supp. at 442-443.

“The provisions of the L.M.R.D.A. were not intended by Congress to constitute an invitation to the courts to intervene at will in the internal affairs of unions. Courts have no special expertise in the operation of unions which would justify a broad power to interfere. The internal operations of unions are to be left to the officials chosen by the members to manage those operations except in the very limited instances expressly provided by the Act. The conviction of some judges that they are better able to administer a union’s affairs than the elected officials is wholly without foundation. Most unions are honestly and efficiently administered and are much more likely to continue to be so if they are free from officious intermeddling by the courts. General supervision of unions by the courts would not contribute to the betterment of the unions or their members or to the cause of labor-management relations.”

In *Coleman v. Brotherhood of Railway and Steamship Clerks, et al.*, 340 F.2d 206 (2d Cir. 1965), at page 209, this Court said,

“In the very recent case of *Gurton v. Arons*, 339 F.2d 371 (2d Cir. 1964), we said:

“‘A simple reading of Section 501 shows that it applies to fiduciary responsibility with respect to the money and property of the union and that it is not a

catch-all provision under which union officials can be sued on any ground of misconduct with which the plaintiffs choose to charge them.' "

Appellant in his brief relies heavily on the case of *Johnson v. Nelson*, 325 F.2d 646 (8th Cir. 1963). In that case the Court had before it a matter involving intra-union wrongdoing involving an illegal local union trial of certain members who did not agree with pension plans supported by the local union officials and a refusal of the union officials to pay the attorneys' fees for the wronged members, even though such payment was approved by a majority of the local union. That case is as different from this case as day is from night—here BRAC is attempting to provide a more workable union structure for a drastically reduced number of members and all the actions of the union or its officers or agents to that end have been specifically authorized by Resolution No. 201 of the 1971 BRAC Convention.

The appellant also places great reliance on the case of *Sabolsky v. Budzanoski*, 457 F.2d 1245 (3rd Cir. 1972). In that case over 100 members were plaintiffs complaining that the International and District 5 of the union were keeping some 37 local unions on the books and maintaining such 37 locals even though these locals had less than 10 members and under the union's constitution should have been disbanded. In that case the Court found a union maintaining illegal locals for purposes of retaining political strength, whereas in the BRAC case before the Court we find a positive plan for the benefit of the members of the Express Division. There is no point on which these cases meet, and therefore it is submitted that the *Sabolsky* case has no relevance to the issue before the Court in this matter.

POINT II

29 U.S.C. Section 501 (a) supports BRAC's restructuring of the Express Division.

Appellant complained of some imagined dark and tricky operations within the union and sought to have the District Court enjoin the restructure of the Express Division urging the District Court to take jurisdiction under Section 501 of the L.M.R.D.A. The record of this case shows that BRAC and all of its officials and committees involved in the preparation of the restructuring plan and its adoption acted in conformance with Section 501. Section 501(a) provides:

“The officers, agents, shop stewards and other representatives of a labor organization occupy positions of trust in relation to such organization and its members as a group. It is, therefore, the duty of each such person, taking into account the special problems and functions of a labor organization, to hold its money and property solely for the benefit of the organization and its members and to manage, invest and expend the same in accordance with its constitution and by-laws *and any resolution of the governing bodies adopted thereunder * * *.*” (Emphasis added.)

The record shows that all of the actions taken by BRAC and its concerned officers or agents in connection with the restructuring of the Express Division were done in accordance with and as directed by Resolution No. 201 of the BRAC Quadrennial Convention of 1971 and therefore the intention of the Legislature enacting Section 501 was complied with by the appellees.

Conclusion

The plan of restructure for the Express Division of BRAC was proposed by a subordinate unit, to wit, the National Association of Express General Chairmen, approved by the Committee on Structure and then by the Executive Council, the supreme council of BRAC, and then put into effect on July 1, 1974 by order of the International President. All of this was done pursuant to Resolution No. 201 of the 1971 BRAC Convention.

The old structure of the Express Division was established many years ago to represent a labor force of some 40,000 to 50,000 persons when the Railway Express Agency was in active operation in all parts of the United States. By 1971 the members had dropped in number to 30,000 and at the time the plan was presented to the Committee on Structure the members numbered some 23,000, and of that number only about 13,000 were full dues-paying members.

To have continued the old system of 120 local lodges would have resulted in less and less service being given to the individual active members because many of the local lodges were having financial and personnel problems which hindered their operation in a manner which would not give maximum service and representation to the members across the country.

The need existed for a more simplified structure for the Express Division and the appropriate action to establish the new structure on an experimental basis was taken by BRAC so that the BRAC Convention in May 1975 will

have the proposed new structure to either approve or disapprove. Certainly a year's experience with the new structure will permit the delegates at the 1975 convention to make an informed judgment on the question of ratification of this plan.

The appellant has in his brief referred to a "Machiavelian eye" and "the recent United Mine Workers' and Watergate scandals." Such references are, of course, unfair and resented by the appellees; however, they accept them for what they are, attempts to cloud the issue before this Court.

The appellees have confined their brief to the facts and the law so as not to confuse the real issue.

It is respectfully submitted that in view of the facts of the case and the law as pronounced in this Second Circuit relative to 29 U.S.C. Section 501 the decision of the District Court be affirmed.

Respectfully submitted,

REILLY, FLEMING & REILLY
Attorneys for Appellees

WILLIAM J. DONLON
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Of Counsel:

DAVID J. FLEMING
PAUL G. REILLY, JR.

Affidavit of Service by Mail

In re:

Head v. Brotherhood of Railway, Airline, and Steamship Clerks, etc.

State of New York

County of New York, ss.:

..... Harry Minott,
 being duly sworn, deposes and says, that he is over 18 years of age.
 That on **DEC 19 1974**, 197....., he served 3 copies of the
 within Brief in the above named matter
 on the following counsel by enclosing said three copies in a securely
 sealed postpaid wrapper addressed as follows:

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and depositing same in the official de-
 pository under the exclusive care and
 custody of the United States Post
 Office Department within the City of
 New York.

and depositing same at the Post Office
 located at Howard and Lafayette
 Streets, New York, N. Y. 10013.

Harry Minott

Sworn to before me this 19th
 day of Dec. 1974

Jack A. Messina
 JACK A. MESSINA
 Notary Public, State of New York
 No. 30-2673500
 Qualified in Nassau County
 Cert. Filed in New York County
 Commission Expires March 30, 1975

